82-272

No. _____

Office - Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM McKINNEY, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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I

QUESTIONS PRESENTED

Whether the imposition of multiple convictions and sentences at a single trial for both armed criminal action (defined by § 571.015, RSMo 1978, as the commission of a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon"), and the underlying or predicate felony, for conduct arising from the same transaction, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, insofar as it bars "multiple punishments for the same offense", where such multiple convictions and sentences are expressly authorized by statute.

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No. _____

IN THE

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OCTOBER TERM, 1982

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM McKINNEY, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

The petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled State of Missouri vs. William McKinney, Jr., No. 31,553.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, reversing the respondent's conviction for armed criminal action on federal double jeopardy grounds was issued on March 23, 1982, and is presently reported at 633 S.W.2d 164. It also has been reprinted in its entirety in Appendix A, *infra*, of this petition.

JURISDICTIONAL STATEMENT

On March 23, 1982, the Missouri Court of Appeals, in the case styled State of Missouri v. William McKinney, Jr., No. WD 31, 553, reversed the respondent's conviction for armed criminal action, § 571.015, RSMo 1978, on the ground that convictions for both armed criminal action and the underlying felony (in this case, robbery in the second degree, § 569.030, RSMo 1978), "constitute[d] a violation of his constitutional right against double jeopardy." *State* v. *McKinney*, 633 S.W.2d 164, 165-166[3] (Mo.App., W.D. 1982). The respondent's alternative motion for rehearing or transfer to the Missouri Supreme Court was overruled on May 4, 1982, and the opinion became final on June 14, 1982, when the Missouri Supreme Court denied the State's timely application to transfer. *State* v. *McKinney, supra*, 633 S.W.2d at 164.

This petition has been filed within 60 days after the entry of final judgment in this case as required by 28 U.S.C. § 2101(d) and Rule 20.1 or this Court, and this Court's jurisdiction is invoked under U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *

STATUTES INVOLVED

Sections § 556.041, 556.046, § 569.030 and 571.015, RSMo 1978, § 559.225, RSMo Supp. 1976, and § 571.017, RSMo Supp. 1982, are set out in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set out in Appendix C.

STATEMENT OF THE CASE

This petition involves the same issue upon which this Court recently granted certiorari in *Missouri* v. *Danny Hunter*, No. 81-1214 (U.S. April 5, 1982), granting certiorari in *State* v. *Hunter*, 622 S.W.2d 374 (Mo.App., W.D. 1981). In this case, as in *Hunter*, the respondent's conviction and sentence for armed criminal action, § 571.015, RSMo 1978,[1] was vacated on the ground that convictions for both armed criminal action and the predicate felony, imposed in the same trial and arising out of the same criminal transaction, violated the Fifth Amendment's prohibition against double jeopardy.

The facts of this case, for purposes of the double jeopardy clause, are substantially the same as in *Hunter*, inasmuch as the respondent in this case was charged and convicted, in a single trial, of both armed criminal action, § 571.015, and the underlying felony, in this case, robbery in the second degree, § 569.030, RSMo 1978.

As previously indicated, the issue presented by this petition is identical to the issue which will be considered by this Court this fall in *Missouri* v. *Hunter*, *supra*, and also is identical to the issues presented by the certiorari petitions filed by the State of Missouri in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982); *Missouri* v. *Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981); and *Wyrick* v. *Williams*, No. 80-2200 (petition for certiorari filed June 29, 1981).

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[1] In *Hunter*, as well as most of the previous cases that are or have been before this Court involving Missouri's armed criminal action statute, the defendants were convicted of armed criminal action under § 559.225, RSMo Supp. 1976, which statute was repealed and re-enacted as § 571.015, effective January 1, 1978. As re-enacted, § 571.015 is a verbatim rescript of § 559.225 with only two minor exceptions, neither of which is relevant to the issues presented by this petition.

REASONS FOR GRANTING THE WRIT

The petitioner submits that a writ of certiorari should issue in this case because the holding of the Missouri Court of Appeals, Western District, and the decisions of the Missouri Supreme Court on which it was based, is in direct and irreconcilable conflict with recent decisions of this Court, particularly *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 LEd.2d 715 (1980).

In this case, the respondent contended on direct appeal "that his conviction for armed criminal action [wa]s invalid as in violation of his rights against double jeopardy". *State* v. *McKinney*, 633 S.W.2d 164, 165 (Mo.App., W.D. 1982). In response, the Missouri Court of Appeals stated:

> "Where a defendant is convicted of second-dgree robbery, his conviction for armed criminal action, growing out of the same incident, constitutes a violation of his constitutional right against double jeopardy. In such a case the armed criminal action conviction must be set aside. *State* v. *Kane*, 629 S.W.2d 370 (Mo.App. 1981); *State* v. *Kane*, 629 S.W.2d 372 (Mo. banc 1982); *State* v. *Thompson*, Mo.App., 629 S.W.2d 361 (1981); *State* v. *Thompson*, 629 S.W.2d 369 (Mo. banc 1982)."

State v. *McKinney*, *supra*, 633 S.W.2d at 165-166.

In accordance with this ruling, the Court of Appeals affirmed the respondent's conviction and 11-year sentence for robbery in the second degree, but reversed on double-jeopardy grounds his conviction and concurrent 24-year sentence for armed criminal action. *State* v. *McKinney*, *supra*, 633 S.W.2d at 166.

A. Nonexistence of Independent State Ground

As demonstrated by even a cursory analysis of the opinion by the Court of Appeals in this case, the respondent's conviction for armed criminal action was based *solely* on federal double jeopardy grounds. However, in a virtually identical situation, counsel for the respondents in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982), rather disingenuously argued that there existed an independent state ground for the reversal of the respondents' convictions and sentences for armed criminal action, separate and apart from the Missouri Supreme Court's interpretation and application of the Fifth Amendment.

This argument stems from *dicta* that appears in *State ex rel. Westfall* v. *Ruddy*, 621 S.W.2d 42 (Mo. banc 1981), a case which specifically involved the question of whether the State could *charge* a defendant with both armed criminal action under § 571.015 and the underlying felony. The court reaffirmed its early rulings that convictions for both armed criminal action and the predicate felony violated the double jeopardy clause, *id.*, 621 S.W.2d at 44, and ultimately concluded that "the armed criminal action statute remains a viable part of our criminal law and is available to punish more severely those who use weapons to commit felonies". *Id.* Accordingly, the Court ruled that the State was not precluded from charging and trying the defendant for both armed criminal action and the underlying felony, but that the charges should be submitted in the alternative with directions to the jury that it could only convict of one offense. *Id.*, 621 S.W.2d at 45.

However, in the course of the opinion, the Court made reference to § 556.041, RSMo 1978, which generally precludes a conviction for more than one offense if the second

"offense is included in the other", § 556.041.(1), and later stated that, although the defendant could be charged with, and tried for, both offenses, "the jury may convict of only one of them pursuant to § 556.041.(1)." *Id.*, 621 S.W.2d at 45. In a dissenting opinion written by Donnelly, J., and concurred in by Rendlen, J., Judge Donnelly correctly characterized the above-quoted language as "dicta" and stated that he believed that the reversal of the Missouri Supreme Court's double-jeopardy rationale expressed in previous armed criminal action cases was "a certainty." He then added: "In light of such contingency, the volunteered references in the principal opinion to § 556.041, RSMo 1978, are extremely unfortunate." *Id.*, 621 S.W.2d at 46-47 (Donnelly, J., dissenting).

It is now clear that the "unfortunate" *dicta* in *Ruddy* concerning the effect of § 556.041 represents only the views of its author, Judge Bardgett, and not the majority of the Missouri Supreme Court. For in all of the cases decided by the court involving the validity of multiple punishments for both armed criminal action under § 571.015, RSMo 1978, and the underlying felony, the Missouri Supreme Court has consistently eschewed reliance on *Ruddy* and has decided the issue in every case on the basis of the Fifth Amendment.

For example, in *State* v. *Kane*, 629 S.W.2d 372 (Mo. banc 1981), the court, in setting aside the defendant's conviction and sentence for armed criminal action under § 571.015, relied on its earlier cases interpreting the multiple punishment provisions of § 559.225, RSMo Supp. 1976, *State* v. *Kane, supra*, 629 S.W.2d at 377, and adhered to those rulings in declaring that § 571.015's "attempt to enhance or enlarge" the punishment for the underlying offense was ineffectual, "because of being phrased in terms of separate crime or offense *and in our opinion there-*

by violative of the constitutional prohibition against double jeopardy." (emphasis added.) *Id.*, 629 S.W.2d at 377. Significantly, the majority did not even mention *Ruddy* or § 556.041.

In *State* v. *Thompson*, 629 S.W.2d 369, 370 (Mo. banc 1982), decided on the same day as *Kane*, the court set aside the defendant's conviction for armed criminal action under § 571.015 on the authority of *Kane*, and adopted the original opinion of the Court of Appeals "subject to this opinion." The Court of Appeals had vacated the defendant's conviction for armed criminal action because "convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy." *State* v. *Thompson*, 629 S.W.2d 361, 369[13] (Mo.App., W.D. 1981).

In *State* v. *Arnold*, 628 S.W.2d 665, 667 (Mo. 1982), Division No. 2 of the Missouri Supreme Court ruled that convictions for both armed criminal action under § 571.015 and the underlying felony "constituted double jeopardy and should be reversed."[2]

Most recently, in *State* v. *Upshaw*, ___ S.W.2d ___, Nos. 63,326 and 63,048 (Mo. June 8, 1982), at 4, slip opinion, Division No. 2 of the Missouri Supreme Court invalidated a defendant's conviction for armed criminal action under § 571.015. Unlike prior cases, the court cited *Ruddy*—but only for the proposition that the State could alternatively charge a defendant with both armed criminal action and the underlying felony. Although the court in *Upshaw* went on to say that "the jury may convict the defendant of only one of the charges", the court cited *Sours* v. *State*,

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[2]A consolidated petition for writ of certiorari involving the decisions in *Kane*, *Thompson* and *Arnold* is presently pending before this Court in *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982).

603 S.W.2d 592 (Mo. banc 1980) to support this proposition, not § 556.041. *State* v. *Upshaw, supra,* at 4, slip opinion. Then, in reversing the appellant's conviction for armed criminal action, the court relied on its decisions in *Thompson, Kane,* and *State* v. *Haggard,* 619 S.W.2d 44 (Mo. banc 1981), all of which resolved the multiple punishment question on the basis of the Double Jeopardy Clause. *Id.,* at 4, slip opinion.

Thus, the Missouri Supreme Court has *never* relied on either *Ruddy* or § 556.041 to invalidate a defendant's conviction for armed criminal action,[3] but continues to adhere to its erroneous conclusion that punishments for both armed criminal action under § 571.015 and the underlying felony are prohibited by the Fifth Amendment, regardless of legislative intent. And, in the case presented by this petition, the Court of Appeals relied on prior state cases interpreting the Fifth Amendment—not Ruddy or § 556.041—in concluding that punishment for both armed criminal action and second-degree robbery "constitutes a violation of his constitutional right against double jeopardy." *State* v. *McKinney, supra,* 633 S.W.2d at 165.

Consequently, any attempt by the respondent to rely on the unfortunate (and now discredited) *dicta* of *Ruddy* to argue that there exists some independent state basis

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[3]Obviously concerned that the Missouri Supreme Court might use the *dicta* in *Ruddy* to ignore the specific directive in § 571.015.1 that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law" for the underlying felony, the legislature passed § 571.017, RSMo Supp. 1982, which provides that "[n]othing contained in any other provision of law" apart from § 571.015 "shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." However, since the Missouri Supreme Court has not attempted to use the general language of § 556.041.1(1) to negate the specific multiple-punishment directive of § 571.015.1, this amendment appears to have been unnecessary.

for the result reached in this case, independent of the Fifth Amendment, would constitute nothing more than an acknowledgement that his position on the constitutional issue—the only issue considered by the Court of Appeals—is utterly hopeless. Indeed, in his response to the State's petition for writ of certiorari in *Kane*, counsel for the respondents simply ignored the constitutional issues, and devoted his entire argument to attempting to convince this Court not to grant the petition because of the possibility that there might exist some independent state ground to justify the reversal of the armed criminal action convictions.

However, as previously demonstrated, no such independent state ground exists, either in the cases joined by the *Kane* petition or in this case. There is, therefore, no basis for denying certiorari in this case, or for remanding the case (as the respondents suggested in *Kane*) to the Missouri Court of Appeals to determine the possible existence of some phantom "independent state ground". No such ground exists.

B. Invalidity of Constitutional Holding

The issue presented by this petition is not unfamiliar to this Court. In fact, as previously emphasized, the precise constitutional question presented by this case will be argued before this Court this fall in *State of Missouri* v. *Hunter*, No. 81-1214 (petition for certiorari granted April 5, 1982). The ruling in that case will be dispositive of the issue raised in this petition, and since the State's position relative to the issues presented in that case are briefed at length in both the petition and the brief that was recently filed by the State in *Hunter* those arguments will be only briefly summarized herein.

Essentially, the question presented by this case (and by *Hunter*) is whether the imposition of legislatively authorized multiple convictions and sentences at a single trial for both armed criminal action (defined by § 571.015, RSMo 1978, as the commission of a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon") and the underlying felony, for conduct arising from the same transaction, violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, insofar as it bars "multiple punishments for the same offense".

Unlike the majority of state and federal statutes, which are generally silent as to whether the legislature or Congress has authorized multiple punishments for conduct which violates more than one statute, § 571.015 provides that the punishment provided by this statute "shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."

In *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (*Sours I*), the Missouri Supreme Court overruled its earlier decisions to the contrary and held that, notwithstanding the legislature's unmistakable intent to impose cumulative punishments, a defendant could not be convicted of both armed criminal action and the predicate felony without offending the Double Jeopardy Clause of the Fifth Amendment. The court concluded that the Double Jeopardy Clause precluded conviction for both a greater offense and a lesser-included offense, even in a single trial and even where authorized by the legislature. *Sours* v. *State*, *supra*, 593 S.W.2d at 214, 223.

At the direction of this Court, the Missouri Supreme Court has reconsidered this holding in several subsequent cases, including *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc

1980) (*Sours II*), and *State* v. *Haggard,* 619 S.W.2d 44 (Mo. banc 1981), but on each occasion has stubbornly adhered to the reasoning and result reached in its initial *Sours* opinion.

Actually, this prolonged litigation should never have been necessary. The precise issue presented by these cases was definitively resolved by this Court more than two months prior to *Sours I.* In *Brintley* v. *Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), this Court dismissed for want of a substantial federal question, the defendant's appeal from his multiple convictions for armed robbery under § 750.529, M.C.L.A., and a felony firearms violation under § 750.227(b), M.C.L.A., which were affirmed by a Michigan Supreme Court in the face of a double jeopardy claim identical to that made by the respondent in the instant case. *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979).

The defendant, like the respondent in the case at bar, had argued that his multiple convictions for armed robbery and a felony firearms violation contravened the Fifth Amendment's prohibition against multiple punishments for the same offense, a claim that was summarily rejected by this Court "for want of a substantial federal question." *Brintley* v. *Michigan, supra,* 444 U.S. at 948. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves undisturbed the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 175, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Although the Michigan statute (which is set out in Appendix C of the State's petition for writ of certiorari) differed slightly from Missouri's armed criminal action statute, (since it applies solely to the use of firearms and

not all dangerous or deadly weapons), the constitutional issue raised was identical, and therefore this Court's summary affirmance was binding upon the Missouri Supreme Court. *Hicks* v. *Miranda, supra,* 422 U.S. at 344-345. But even though the appeal in *Brintley* was rejected on November 13, 1979—more than two months prior to the Missouri Supreme Court's decision in *Sours I*—the Missouri Supreme Court has consistently ignored the existence of this decision.[4]

Thus, even though this Court had held by its summary affirmance in *Brintley,* that a conviction for both a felony firearm violation, such as Missouri's armed criminal action statute, § 571.015, and its predicate or underlying felony did not violate the Fifth Amendment's prohibition against multiple punishments for the same offense, the Missouri Supreme Court (and the Court of Appeals in this case) has consistently ruled to the contrary, just as if *Brintley* had never been decided.

In view of the Missouri Supreme Court's refusal to follow *Brintley,* the State successfully sought a writ of certiorari from this Court to review the decision in *Sours I,* and the decision of the Missouri Supreme Court vacating the armed criminal action conviction was set aside by this Court on May 27, 1980, for reconsideration in light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). See *Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). However, on remand, the Missouri Supreme Court reiterated its conclusion that

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[4]The Missouri Supreme Court has recognized that Michigan had reached a contrary result in ruling on the constitutionality of the multiple punishment provisions of its felony firearms statute in *Wayne County Prosecutor* v. *Recorder's Court Judge, supra,* but has chosen to ignore this Court's summary affirmance of that decision *sub nom. Brintley* v. *Michigan, supra.* See *Sours* v. *State, supra,* 593 S.W.2d at 217; *State* v. *Kane,* 629 S.W.2d 372, 376 (Mo. banc 1982).

cumulative punishments for both armed criminal action and the underlying felony constituted multiple punishment for the same offense. *Sours* v. *State*, *supra*, 603 S.W.2d at 605-606.[5]

As a result of *Sours II*, armed criminal action convictions were routinely reversed on double jeopardy grounds and, in most instances, the State sought review by certiorari from this Court. While those petitions were pending, this Court decided *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and ultimately granted certiorari in all of Missouri's pending petitions, and vacated the decisions for re-examination in light of *Albernaz*.[6] But in response to these orders, the Missouri Supreme Court refused to change its position on the double-jeopardy issue. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51. And, in *State* v. *Kane*, *supra*, the Missouri Supreme Court again reiterated its belief that the state legislature's "attempt to enhance or enlarge" a defendant's punishment under the armed criminal action statute was "violative of the constitutional prohibition against double jeopardy" because it is "phrased in terms of separate crime or offense". *Id.*, 629 S.W.2d at 377.

In a nutshell, it is the State's position that the decisions of the Missouri Supreme Court previously discussed, and the decision of the Missouri Court of Appeals in this case,

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[5]On January 26, 1981, the State's petition for a writ of certiorari to review the decision in *Sours II* was denied, *Missouri* v. *Sours*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981), presumably because Sours had fully served both sentences by the time the petition was ruled on.

[6]*See Missouri* v. *Counselman*, 450 U.S. 990, 101 S.Ct. 1690, 68 L.Ed.2d 190, (1981); *Missouri* v. *Brown*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri* v. *Greer*, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri* v. *Sinclair*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Lowery*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Crews*, 452 U.S. 957, 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981).

are in conflict with and contrary to numerous decisions of this Court, including *Albernaz, Whalen* and *Brintley*. To be sure, the double jeopardy clause of the Fifth Amendment applies to the States through the Fourteenth Amendment and prohibits among other things, "multiple punishments for the same offense". But this protection, insofar as it is available to a defendant in a case involving a single prosecution for several statutory violations, committed in the same transaction, acts exclusively as a restraint on prosecutors and the courts and is designed to ensure that a defendant does not receive more punishment than the legislature intended to be imposed. In other words, the Fifth Amendment does not operate as a substantive limitation on the legislative power to define crimes and impose penalties for their violation. Although other provisions of the United States Constitution, such as the Eighth Amendment, restricts the legislative power in this area, the Fifth Amendment does not.

Consequently, the conclusion of the Missouri Court of Appeals, Western District, that multiple punishments for the offense of armed criminal action and the underlying felony (in this case, second-degree robbery), imposed at a single trial, violate the Fifth Amendment, notwithstanding the legislature's intent to punish for both offenses, is clearly erroneous and constitutes a fundamental misunderstanding of the Double Jeopardy Clause and its effect on single-prosecution cases.

In invalidating the respondent's conviction and 24-year sentence for armed criminal action on the ground that it constituted unconstitutional punishment, the Missouri Court of Appeals relied on previous decisions of the Missouri Supreme Court, all of which interpreted *Blockburger* v. *United States*, 284 U.S. 229, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), as a rule of substantive double jeop-

ardy law, rather than a rule of statutory construction. Missouri courts have concluded that, by definition, all of the elements of the underlying felony automatically become elements of armed criminal action, and thus the predicate felony will always constitute a "lesser-included offense" of armed criminal action. Applying *Blockburger* as a constitutional touchstone, the Missouri courts have concluded that, since the predicate felony will never include an element not necessarily incorporated in the offense of armed criminal action, the *Blockburger* rule prohibits, as a matter of constitutional law, convictions for both the greater offense (armed criminal action), and the lesser crime (the predicate felony).

But *Whalen* and *Albernaz* clearly demonstrate that this analysis of the Fifth Amendment is seriously flawed. *Whalen* held that *Blockburger* is not a rule of substantive constitutional law, but rather only "a rule of statutory construction", and that even if, upon application of the *Blockburger* test, two crimes are found to constitute the "same offense", cumulative sentences will not be prohibited if "elsewhere specifically authorized" by the legislature. *Id.*, 445 U.S. at 693.

This Court's ruling in *Albernaz* is even more explicit. In discussing the role and scope of the double jeopardy clause, insofar as it prohibits "multiple punishments for the same offense" imposed at a single trial, this Court unequivocally held:

(1) that "[t]he *Blockburger* test is a 'rule of statutory construction' ", which, "because it serves as a means of discerning congressional purpose", is not "controlling where, for example, there is a clear indication of contrary legislative intent." *Id.*, 450 U.S. at 340, 101 S.Ct. at 1143;

(2) that in considering the permissibility of multiple

punishments for offenses arising out of the same transaction, "the 'dispositive question' [i]s whether Congress intended to authorize separate punishments for the two crimes." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145.

(3) that the " 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145;

(4) that " 'where consecutive sentences are imposed at a single criminal trial," the role of the Fifth Amendment's prohibition against multiple punishments for the same offense, " 'is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145; and

(5) that, as a result, "the question of what punishments are constitutionally permissible is *not different from* the question of what punishment the Legislative Branch intended to be imposed" and where, as here, there exists a legislative intent "to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145. (emphasis added; footnote omitted.)

In the instant case, it is undisputed that the Missouri legislature intended that a defendant, who uses a dangerous or deadly weapon to commit a felony in the State of Missouri, should be sentenced and punished for both the felony he committed and the additional offense of armed criminal action. Since the legislature's intent in this respect is clear, there is no need to even resort to *Blockburger* or any other rule of statutory construction. As *Albernaz* expressly states, "the question of what punishments are constitutionally permissible is not different from the ques-

tion of what punishment the Legislative Branch intended to be imposed"; accordingly, the intent of the Missouri legislature in this case is dispositive of the respondents' double jeopardy claim and requires that the decision of the Missouri Court of Appeals, Western District, be vacated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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